

**COMMONWEALTH OF MASSACHUSETTS
BEFORE THE
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY**

FIBERTECH NETWORKS, L.L.C.)	
f/k/a FIBER SYSTEMS, L.L.C.)	D.T.E. 02-47
)	
v.)	
)	
VERIZON NEW ENGLAND, f/k/a)	
NEW ENGLAND TELEPHONE)	
AND TELEGRAPH COMPANY)	
)	
and)	
)	
WESTERN MASSACHUSETTS)	
ELECTRIC COMPANY)	
)	

**WESTERN MASSACHUSETTS ELECTRIC COMPANY’S OPPOSITION
TO FIBERTECH’S MOTIONS FOR RECONSIDERATION AND
CLARIFICATION**

I. INTRODUCTION

On August 13, 2002, Fiber Technologies Networks, L.L.C. filed with the Department of Telecommunications and Energy (“Department”) a complaint against Western Massachusetts Electric Company (“WMECO”) and Verizon New England d/b/a Verizon Massachusetts (“Verizon”) (collectively “the utilities”) alleging that the utilities failed to grant or deny Fibertech’s request to attach fiber optic cable to the utilities’ poles.¹ On August 27, 2002, WMECO filed

¹ On August 5, 2002, Verizon filed suit against Fibertech in Hampden Superior Court alleging a breach of its aerial licensing agreement. On August 12, 2002, WMECO filed its own complaint against Fibertech in Hampden Superior Court alleging a breach of the aerial licensing

an Answer to the Complaint and requested that the Complaint be dismissed. On December 24, 2002, the Department issued an Order of Dismissal Without Prejudice (“Order”) in this matter.²

On January 15, 2003, Fibertech filed a Motion for Reconsideration and Clarification as well as a Motion for an Extension of the Judicial Appeal Period.³

Both of Fibertech’s motions should be rejected. Fibertech’s Motion for Reconsideration and Clarification fails to satisfy the Department’s standards for reconsideration or clarification.

Moreover, the requests for reconsideration and clarification are nothing more than an improper attempt to re-litigate issues that have been clearly resolved by the Department. The Department should repudiate this attempt and affirm its long-standing precedent that precludes re-review of decided issues unless certain special situations pertain, none of which are present here.

II. REQUEST FOR RECONSIDERATION

A. Standard for Review

The Department’s standard of review for reconsideration requires “extraordinary circumstances dictat[ing] that [the Department] take a fresh look at the record...” (*Boston Edison Company*, D.P.U. 90-270-A, pp. 2-3 (1991)). In the alternative, reconsideration may be granted if previously unknown or undisclosed facts are brought to light (*id.*), or when a

agreement. Those complaints were consolidated in Civil Action No. 02-843. On August 13, 2003, Fibertech filed this complaint.

² The Department’s December 24, 2002 Order also denied Fibertech’s Motion for Protective Treatment of Confidential Information for information attached to Fibertech’s Complaint.

³ Although these documents were filed with the Department on January 15, 2003, WMECO did not receive them until January 20, 2003.

decision is the result of mistake or inadvertence (*Commonwealth Electric Company*, D.P.U. 89-114/D.P.U. 90-331/D.P.U. 91-80, p. 4 (1991)).

Fibertech has failed to make any showing that it has met the Department's standard for reconsideration. In fact, Fibertech does not mention the standard in its Motion and it is not clear that Fibertech even knows what the standard is. Instead of attempting to show how it has met the burden of the Department's standard, Fibertech has simply thrown together a smorgasbord of unfounded assertions. Based on its failure to address the Department's standard for reconsideration, Fibertech's Motion must be rejected. Although WMECO believes Fibertech's Motion is deficient and must be rejected on this ground, it does, below, attempt to address certain Fibertech arguments. WMECO does so in an attempt to set the make the record clear.

B. Fibertech Has Failed to Meet Its Burden in Regard to the Department's Order that Fibertech's Installation of Facilities Created a Risk to Public Safety.

Fibertech requests reconsideration of the Department's findings that Fibertech's installation of facilities posed a significant risk to public safety. However, the Department's Order does not rest on the fact that Fibertech's facilities are a safety hazard. So while Fibertech has spent 9 of 16 pages in its Motion arguing that its facilities are not a hazard, the fact is that Fibertech's complaint was dismissed based on the fact that its' complaint failed to state with any specificity any instances where Fibertech was wrongfully denied access to a pole. Department Order page 4.

C. Fibertech's Request for Reconsideration Based on the Department's Ruling on Pole Attachment Regulations is Deficient and Should Be Rejected

Fibertech also asks that the Department reconsider its ruling regarding the 45-day period within which a utility must inform an applicant if its application is deemed denied. The Department's Order states that "there is nothing in our Pole Attachment Regulations to suggest that a pole attachment request is 'deemed granted' if a written denial is not issued after 45 days pursuant to 220 C.M.R. § 45.03."

Fibertech again fails to show how the assertions set forth in its Motion are relevant to the Department's standards for reconsideration. Fibertech has not brought forth any "previously unknown or undisclosed facts" nor has Fibertech established any "mistake or inadvertence" of the type cited in *Commonwealth*. Fibertech simply rehashes old arguments that it has previously made.

Fibertech's Motion argues that delays by the utilities have caused them to breach contracts and that Fibertech was facing the loss of customers. The Department's Order clearly states that if Fibertech felt that they were being denied access, they should have "followed the procedures for filing a complaint alleging that it has been improperly denied access to the requested poles" and not engaged in "self-help." Order page 8 citing 220 C.M.R. § 45.04.

In sum, Fibertech simply disagrees with the Department's decision regarding the 45-day rule and tries to create a basis for reconsideration out of that disagreement. Fibertech believes that an application is deemed granted if the application is not denied within 45 days. The Department has set forth a clear contrary position, however, and, once again, Fibertech fails to

present an argument that may be considered within the Department's standard for reconsideration.

- D. Fibertech's Disagreement With the Department with Respect to the Need to Specify Particular Terms and Conditions That Are Unreasonable Is Not a Basis for Reconsideration. Nor Is Fibertech Claim of Discriminatory Treatment Such a Basis.

Fibertech argues that by virtue of it having included every pole attachment application filed with Verizon and WMECO in its complaint, that it has identified specific terms and conditions that are unreasonable. The Department made it clear that Fibertech must "state a claim under the Pole Attachment Statute and Regulations regarding a denial of a specific pole attachment or specific attachment rate, term, or condition alleged to be unreasonable." Order pg. 6.

Fibertech takes exception to the Department's ruling, stating that the alleged "violations of the 45 day rule" by Verizon and WMECO constitute specific instances of denials. Fibertech may choose to disagree with the Department's ruling but this is not a basis for reconsideration. Fibertech has once again failed to allege any "extraordinary circumstances" or "previously unknown or undisclosed facts" that would warrant the Department's reconsideration of this matter.

- E. Fibertech has failed to meet its burden in demonstrating that the Department should reconsider finding that Fibertech's Complaint failed to identify with sufficient specificity the poles and conduits to which it was denied access

Fibertech's Motion states that its Exhibit D of the Complaint satisfies the requirement that it specifically state to which poles and conduits it was denied access. Fibertech Motion misses the Department's point. The Department makes a review on the denial of access on a "pole by pole basis." Department Order page 6, footnote 7. Fibertech has failed to state ANY pole that it was denied access to. This is because in no case has WMECO unreasonably denied access to a pole. Throwing together a list of applications does not state with specificity where Fibertech was denied access.

Here again, Fibertech has failed to meet the Department's standards of "extraordinary circumstances" or "previously unknown or undisclosed facts" that would warrant reconsideration of this matter.

III. REQUEST FOR CLARIFICATION

A. Standard of Review

The Department may grant clarification of previously issued orders "when an order is silent as to the disposition of a specific issue requiring determination in the order, or when the order contains language that is sufficiently ambiguous so as to leave doubt as to its meaning." Boston Edison Company, D.P.U. 90-270-A (1991); Whittensville Water Company, D.P.U. 89-67-A (1989). Accordingly, clarification is only appropriate when an order is silent on an issue requiring determination or when ambiguity leaves doubt as to its meaning. Fibertech fails to meet this standard and, instead, presents odd requests in the guise of clarification.

B. Fibertech's Request for Clarification

The only time throughout the entire Fibertech Motion that the word “clarification” is used, is in the heading requesting clarification. Accordingly, Fibertech has not argued for clarification and this request must be rejected. In any case, the Department’s Order is not silent, nor ambiguous on any of the issues raised by Fibertech. The Department’s Order discusses each of the issues in detail and sets out its reasons for its rulings. Fibertech simply does not agree with them. As such, Department should not grant Fibertech’s Request for Clarification on any of the issues discussed in its Motion.

IV. CONCLUSION

Fibertech’s Motion has failed to demonstrate how the facts presented in its Motion have in any manner met the Department’s standards for reconsideration and clarification. If the Department were to grant reconsideration or the request for clarification, its standards for both would be substantially compromised. The new standard would allow for reconsideration or clarification if a party merely dislikes an outcome. Any party would be entitled to reconsideration on any issue, and the Department’s scarce resources would have to be diverted to numerous reconsideration and clarification proceedings. For these reasons, the Department should reject Fibertech’s Motion.

WHEREFORE, Western Massachusetts Electric Company requests that the
Department:

Reject Fibertech’s Motion for Reconsideration and Clarification; and,

Reject Fibertech’s request for an extension of the judicial appeal period.

Respectfully submitted,
By Its Attorney,

Stephen Gibelli
Counsel
107 Selden St.
Berlin, Connecticut 06067
Tel. 860-665-5513
Fax. 860-665-5504
e-mail: gibels@nu.com

Dated: February 4, 2003

CERTIFICATE OF SERVICE

I hereby certify that on January _____, 2003, I served a copy of the foregoing on the Respondents, by delivering a copy of the same via personal delivery or first class mail to:

Honorable Jesse Reyes
MASSACHUSETTS DEPARTMENT OF
TELECOMMUNICATIONS AND ENERGY
One South Station, 2nd Floor
Boston, Massachusetts 02110

Charles B. Stockdale, Esq.
Robert T. Witthauer, Esq.
Fibertech Networks, LLC
140 Allens Creek Road
Rochester, New York 14618

Alexander Moore, Esq.
Bruce P. Beausejour, Esq.
Keefe B. Clemons, Esq.
VERIZON NEW ENGLAND
185 Franklin Street
Room 1403
Boston, MA 02110

Matthew E. Mitchell, Esq.
KEEGAN, WERLIN & PABIAN
21 Custom House Street
Boston, MA 02110-3525

Amy Rabinowitz, Esq.
MASSACHUSETTS ELECTRIC CO.
25 Research Drive
Westborough, MA 01582